BRIEF IN SUPPORT OF PETITION.

FIRST POINT

THE DECISION BELOW THAT DEFENSES OF THE PRINCIPAL WERE NOT AVAILABLE TO THE SURETY IS IN CONFLICT WITH DECISIONS IN THE SAME TYPE OF CASES BY THE CIRCUIT COURTS OF APPEAL FOR THE SECOND AND FOURTH CIRCUITS AND THE GENERAL LAW ON SURETYSHIP.

In *National Surety Co.* v. *Holtzman, supra,* at p. 546, which was an action against the surety alone for the recovery of deserting seaman fines, the Court said in part:

> "* * * As far as the immigration authorities were concerned, the fine had been determined and assessed, and the present proceedings were properly brought to test the legality of such determination and assessments, * * *
>
> "* * * The ship, because of the giving of the bond, is released and is not within the jurisdiction of the court, and a proper determination of all issues involved can be had in the present trial."

In *United States* v. *Columbus Marine Corporation, supra,* at p. 796, the Court said:

> "Nevertheless, the bond secured only valid fines, and if there were none, it was not forfeited."

And in *Bank Line Ltd.* v. *United States,* which was an action by the shipowner to recover the same type of fine, recovery was denied on the ground that the payment of the fine was voluntary and that the owner's recourse was to defend an action on the bond. The Court said, p. 54:

> "* * * However, there is this difference between a deposit and a bond: that the owner is forced to make the deposit to clear his ship, and therefore acts under

> duress; while a bond is merely a promise to pay and in an action upon it the obligor can raise the invalidity of the fine."

To the same effect is *Durning* v. *McDonnell, supra.*

In a lengthy note on the law of suretyship in 21 R. C. L., at p. 974, it is stated in part:

> "A cause of action cannot exist against a surety, as such, unless a cause of action exists against his principal. This rule results as a corollary, from the very definition of the contract of suretyship, that the obligation of the surety being accessory to the obligation of the principal debtor or obligor, it is of its essence that there should be a valid obligation of such principal, and that the nullity of the principal obligation necessarily induces the nullity of the accessory. And as a general rule the obligation of the surety, as such, cannot exceed that of the principal, it being said that it would be most unjust and incongruous to hold the surety liable, where the principal is not bound."

The decision of the court below on this point, therefore, is contrary to the settled law and should be corrected.

SECOND POINT.

THE DECISION BELOW WAS ERRONEOUS IN THAT IT HELD THAT A FINE ARISES AUTOMATICALLY UNDER SECTION 20(a) OF THE IMMIGRATION ACT OF 1924 IF AN ALIEN SEAMAN ESCAPES AFTER BEING ORDERED DETAINED REGARDLESS OF THE BASIS OF THE NOTICE TO DETAIN AND THAT EXECUTIVE ORDER 8429 COULD BE ENFORCED THROUGH FINES IMPOSED UNDER SECTION 20 OF THE IMMIGRATION ACT OF 1924.

The cardinal error committed by the Court below was in assuming that a fine arose automatically under Section

20(a) of the Immigration Act of 1924 (appendix p. 15) simply on a showing that an immigration inspector had issued a notice to detain an alien seaman and that the seaman had escaped, without regard to the basis for the notice to detain or the authority of the person who issued it.

The difficulty apparently arose from the fact that Section 20(a) itself does not specify the reasons on which a notice to detain may be issued, but Section 19 (Appendix p. 15) provides for the admission of seamen pursuant to regulations of the Secretary of Labor, and Sections 15 and 24 of the same Act (Appendix p. 21) provide that seamen and other non-immigrants may enter the United States pursuant to regulations made by the Commissioner General of Immigration with the approval of the Secretary of Labor (now Attorney General). Such regulations had been prescribed by the officers designated. Those concerning seamen are set forth in Rule 7, the pertinent provisions of which appear in the Appendix pp. 19, 20. Neither the law nor the regulations thereunder required an alien seaman to have a passport as a condition to shore leave.

Furthermore, regulations have been prescribed under which the Immigration Service is required to serve a notice in writing on the person sought to be charged with a fine under Section 20(a) and such person is granted 60 days within which to submit evidence against the fine to a designated body in the Central Office, now known as the Board of Immigration Appeals.

The Circuit Court of Appeals for the Second Circuit took notice of these regulations in *United States* v. *Columbus Marine Corporation*, 62 F. (2d) 795, 797, and stated that they had the force of law. Although these regulations were before the Court below they were completely ignored by the Court in reaching its conclusion that a fine automatically arose on a showing that a notice to detain had been

issued and that the seaman had escaped. Such a conclusion is contrary to *Compagnie Generale Transatlantique* v. *Etting,* 298 U. S. 217, in which this Court held there was no liability on procedural grounds.

After holding that the petitioner could not invoke the defenses of its principal the Court proceeded with a casual discussion of the defenses that were alleged to be available to the principal, and held that they were without merit.

The stipulation of facts conceded that Pauruga met all of the requirements for shore leave under the Immigration Act of 1924 and all of the regulations issued pursuant thereto. The only question was whether the seaman was properly denied shore leave for the sole reason that he was not in possession of a passport or document of that nature as required by Executive Order 8429 of June 5, 1940 which was not issued under the Immigration Law, and was issued only 5 days before the ship's arrival.

Executive Order 8429, by its own terms, relied for its authority solely on an Act of May 22, 1918, (appendix p. 18) as extended by the Act of March 2, 1921, (appendix p. 19). It did not claim authority from the Immigration laws and did not suggest that it was to be enforced through those laws.

Obviously it could not be supported by the Act of May 22, 1918, because that Act permitted executive action only when the United States was at war, a condition which did not exist on June 5, 1940 when the Executive Order was issued.

The Act of March 2, 1921 was an appropriation act and did nothing more than to continue in effect that part of the Act of May 22, 1918 which related to passport and visa requirements for aliens until otherwise provided by law.

Three years later the Immigration Act of 1924 was passed which by its terms and the regulations thereunder

comprehensively fixed all documentary requirements for the entry of aliens into the United States, whether quota or non-quota. By that Act, the Act of March 2, 1921, which was to remain in force "until otherwise provided by law" was superseded. *Johnson* v. *Keating* (CCA 1) 17 F. (2d) 50, 52; Opinion of Attorney General Jackson, 39 Op. 509, 515, 516. See also *Flora* v. *Rustad* (CCA 8) 8 F. (2d) 335 and *United States* v. *One Airplane &c.* (D.C.S.D. Cal.) 23 F. (2d) 500.

Consequently, Executive Order 8429 had no statutory basis; it could not have invoked the Immigration Act of 1924 because that Act limited the promulgation of rules and regulations to the then Department of Labor, now the Department of Justice. But even assuming that the Executive Order had some valid existence as a directive to enforcement officers, it could not form the basis of a fine under Section 20(a) of the Immigration Act of 1924, because that section contemplated fines only in the case of seamen who did not comply with the requirements of the regulations issued as provided by that Act, and they did not require a passport or document of that nature as a condition to shore leave.

In short, the Executive Order was based on an Act of 1918 that was not then in effect and an appropriation Act of 1921 which was superseded by the Immigration Act of 1924 and which, in any event was only a regulatory measure which did not provide any penalty for its violation. This was pointed out in *Flora* v. *Rustad, supra,* where it was said, p. 337 that by the 1921 Act certain provisions of the 1918 Act were "retained for regulatory purposes, without any legislative expression on the subject of criminal liability for entry without a passport". And further, "it was to regulate entry, not to punish those who violated the regulations."

Certainly the Executive Order cannot be construed to go beyond the acts on which it is expressly founded to enforce penalties that were not provided in those acts.

THIRD POINT.

THE DECISION BELOW WAS ERRONEOUS AND IN CONFLICT WITH THE COURT OF CLAIMS IN HOLDING THAT A FINE COULD BE BASED ON A NOTICE TO DETAIN ISSUED BY A BOARDING INSPECTOR INSTEAD OF THE IMMIGRATION OFFICER IN CHARGE AT THE PORT, AS REQUIRED BY THE STATUTE.

The only statutory powers granted to boarding inspectors are found in Sections 15 and 16 of the Immigration Act of 1917 (8 U. S. C. 151, 152) Appendix p. 21. Their only function is to permit entry if satisfied that the alien is entitled to enter. If they are in doubt, they have no power to prohibit entry but are required to have the alien detained for examination by a Board of Special Inquiry, which is the body through which the immigration officer in charge acts in such matters. Consequently, a notice to detain by a boarding inspector is invalid and cannot form the basis for a fine.

This view has the support of the Court of Claims in *Rio Cafe Line* v. *United States,* 89 Ct. Cls. 307, 316, 317. An earlier decision, *Lloyd Royal Belge* v. *Elting,* 61 F. (2) 745, took a contrary view notwithstanding the plain language of the statute.

Conclusion.

Because of the importance of the questions involved and of the diverse views taken by the Courts on most of them, petitioner respectfully submits that a writ of certiorari should be granted as prayed in order that the questions presented may be definitely and finally determined.

Respectfully submitted,

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